

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In re:)
Docket to Determine the Compliance)
of BellSouth Telecommunications, Inc.'s)
Operations Support Systems with State)
and Federal Regulations)

REC'D TN
REGULATORY AUTH.
*02 FEB 13 PM 1 56
Docket No. 01-00362
EXECUTIVE SECRETARY

**INTERVENORS' BRIEF ON SANCTIONS AGAINST BELL SOUTH
FOR FAILING TO COMPLY WITH LAWFUL ORDERS**

On February 5, 2002, the Authority determined that BellSouth Telecommunications, Inc. ("BellSouth") "failed to comply with lawful orders and/or findings of the agency. *Notice of Complaint and Hearing* dated February 5, 2002, at 1 ("*February 5th Notice*"). In conjunction with that determination, the Authority directed the parties to this docket to file briefs "regarding the nature and number of violations and the calculation of any penalty." *February 5th Notice*, at 2. Accordingly, the Intervenor hereby submit their brief on the three specified issues.¹

BACKGROUND

AT&T and SECCA submitted Interrogatory No. 36 on September 17, 2001. Interrogatory No. 36 sought state-specific order flow through data for particular types of wholesale products. This information was central to the regionality issues being addressed in Phase I of this docket because state-specific flow through data could indicate the extent to which the performance of BellSouth's operations support systems for ordering varied from state-to-

¹ The Intervenor consist of AT&T Communications of the South Central States, L.L.C. Inc. and TCG MidSouth, Inc. (collectively "AT&T"), the Southeastern Competitive Carriers Association ("SECCA"), and MCI Worldcom, Inc.

state. BellSouth did not object to Interrogatory No. 36 before the deadline set by the Authority even though it did object to other discovery requests.

On October 12, 2001, BellSouth "responded" to Interrogatory No. 36 by asserting that it did not produce the requested data. AT&T and SECCA filed a motion to compel on November 2, 2001. The Authority convened a pre-hearing conference on November 8, 2001 to address the motion to compel and other issues. After considering the arguments made by parties concerning relevance and technical feasibility, the Pre-Hearing Officer issued a verbal order directing BellSouth to provide the data requested by Interrogatory No. 36 by November 13th, or file by the same date a written explanation as to why providing the requested data was not technically feasible. BellSouth did not provide the requested data or file a written explanation regarding technical feasibility on November 13th. Accordingly, the Authority issued an order on November 14th that noted BellSouth did not submit a written explanation regarding technical feasibility and directed BellSouth to provide the requested data by November 20th.

On November 16th, BellSouth submitted its supplemental responses to discovery requests, including a "response" to Interrogatory No. 36. In its supplemental response, BellSouth did not produce the requested flow through or assert that it was not technically feasible to do so. Rather, BellSouth stated that it "has not done an in-depth investigation to ascertain the technical feasibility, cost, or implementation effort associated with the development of state specific reports as requested by AT&T." On November 20th, BellSouth filed a motion to clarify the Authority's November 14th Order. In its motion, BellSouth argues for the first time that, regardless of technical feasibility, the Authority's order directing BellSouth to provide the data was "legally erroneous" because it allegedly required BellSouth to produce documents that do

not exist. On November 21st, the Authority issued an order denying BellSouth's motion to clarify and directing BellSouth to provide the requested data by November 29th.

BellSouth did not provide the requested data on November 29th. Instead, BellSouth filed a "Second Supplemental Response" in which it conceded that it is technically feasible to provide the requested data. BellSouth, however, alleged that it would take "a period of more than 90 days" after it commenced actions to provide such data, and that it had not yet commenced such actions. BellSouth also alleged that the data would have no probative value.

At the Phase I hearing on December 3rd, the Authority again heard the parties' arguments regarding the legal propriety of Interrogatory No. 36, its relevance, probative value, and technical feasibility. After considering those arguments, the Authority again directed BellSouth by verbal order to provide the requested data and set a new deadline of January 18, 2002. Six weeks later on January 15th, BellSouth filed a motion for reconsideration of the deadline set by the Authority. Three days later on the January 18th deadline, BellSouth submitted another "response" to Interrogatory No. 36 in which BellSouth stated that it would not be producing the requested data before the third week in February. BellSouth, however, did not provide any detailed information about the actions it took (if any) to meet the Authority's deadline.

By order dated February 5, 2002, the Authority denied BellSouth's motion for reconsideration and initiated this proceeding on sanctions.

I. BELLSOUTH'S VIOLATIONS HAVE BEEN CONTINUOUS.

BellSouth's continuing violations of the Authority's orders have needlessly protracted the final resolution of Interrogatory No. 36. Early on, it may have been reasonable to give BellSouth the benefit of the doubt and characterize the nature of its initial actions as a case of "overzealous advocacy." As this matter proceeded, however, a pattern emerged that went far beyond the bounds of proper advocacy. Indeed, this pattern was accurately described by Director Malone at the February 5th Authority conference:

On various due dates, BellSouth has either not responded or responded in the way that supported BellSouth's positions as opposed to responding to the hearing officer's orders.

Tr. 2/5/02, at 17. This pattern, moreover, has reflected what Director Greer characterized as "a corporate attitude that may well serve investors but is not likely to have the same effects on due process or the Authority's ability to meet its statutory obligation." *Tr. 12/6/01 at 15.*

As Director Malone noted at the February 5th Authority conference, "[t]here is a time to argue one's position and then there is a time to comply with the Authority's orders." *Tr. 2/5/02, at 17.* Throughout this docket, however, BellSouth has attempted to test the Authority's resolve and patience by re-arguing its position rather than respecting the Authority's initial orders. For example, the Authority repeatedly made clear its expectation that BellSouth would produce witnesses from KPMG and PWC, but BellSouth refused to cooperate until the Authority had imposed severe evidentiary sanctions. The Authority also repeatedly ordered BellSouth to file a compliant Phase I matrix, but continued to frustrate the Authority's ability to obtain that matrix. Indeed, the matrix that BellSouth ultimately filed on the eve of the Phase I hearing was practically useless because it was incomplete and had not even been reviewed by BellSouth's testifying witnesses.

Here, the Authority repeatedly ordered BellSouth to provide the data in response to Interrogatory No. 36 in a timely manner, but BellSouth has continued to resist those orders. BellSouth's most recent actions are perhaps the most illustrative of its continued resistance and protraction. On December 3, 2001, the Authority issued a verbal order that BellSouth produce the requested data on or before January 18, 2002. Rather than filing a Motion for Reconsideration immediately after the Authority's verbal order, BellSouth waited six weeks until January 15, 2002 (just three days before the Authority's deadline for providing the data) to file its motion. Furthermore, instead of keeping the Authority advised of the progress it was making against the January 18th deadline, BellSouth waited until the deadline itself to advise the Authority that the required data would not be available until the third week in February. Even then, BellSouth failed to provide the Authority with credible, detailed evidence of the actions it took, if any, to depart from its original proposed project plan/schedule and meet the Authority's January 18th deadline. By waiting so long before engaging the Authority in a constructive manner, BellSouth's noncompliance has become a *fait accompli* that leaves the Authority with no real options but to impose sanctions.

II. BELLSOUTH VIOLATED MULTIPLE ORDERS.

The Authority has issued numerous orders related to Interrogatory No. 36, and BellSouth has not yet complied with a single one. Specifically, BellSouth has objected on several occasions to the propriety of Interrogatory No. 36 (the latest objections being raised during the Phase I hearing), but failed to file a timely objection by the September 24, 2001 deadline established by the Authority's *Order Establishing Procedural Schedule*. BellSouth, moreover, has suggested several times that it was not technically feasible to produce the requested data, but BellSouth failed to meet the Authority's deadline for filing a written explanation regarding

technical feasibility. BellSouth, moreover, subsequently conceded that providing the data was technically feasible. Most importantly, BellSouth has missed five different deadlines for producing the data (October 12th, November 13th, November 20th, November 29th, January 18th).

A summary of the relevant mandates and due dates established by the Authority's Orders is provided below.

Order	Mandate	Due Date
Order Establishing Procedural Schedule dated 9/13/01	File objections to discovery requests	9/24/01
Order Establishing Procedural Schedule dated 9/13/01	File response to discovery requests	10/12/01
Verbal Order at Prehearing Conference dated 11/8/01	Provide requested flow through data or explain why it is not technically feasible.	11/13/01
Order Resolving Procedural Motions dated 11/14/01	Provide requested flow through data	11/20/01
Order Denying Motion to Clarify and Compelling Discovery dated 11/21/01	Provide requested flow through data	11/29/01
Verbal Order at Phase I Hearing dated 12/3/01	Provide requested flow through data	1/18/02
Order on Procedural Matters dated 12/31/01	Provide requested flow through data	1/18/02

In sum, BellSouth has violated at least seven different requirements ordered by the Authority with respect to Interrogatory No. 36.

III. THE AUTHORITY SHOULD IMPOSE SANCTIONS.

The Intervenors have previously requested that the Authority impose evidentiary sanctions against BellSouth for failing to comply with the Authority's orders regarding Interrogatory No. 36. Specifically, the Intervenors recommended that the Authority (1) strike all of BellSouth's evidence regarding the regionality of its ordering OSS; or (2) prohibit BellSouth from contesting the reasonableness of AT&T's Hearing Exhibit No. 8 as a surrogate for state-

specific flow through rates for the purposes of determining whether BellSouth's ordering OSS are regional. Evidentiary sanctions still remain a viable option for the Authority.

The Authority also has the discretion to impose monetary sanctions on BellSouth pursuant to Tenn. Code Ann. § 65-4-120. That statute provides for monetary sanctions of up to \$50 per day for each violation. Given the multiple orders that have been violated (see above), the multiple parts of Interrogatory No. 36², and the duration of BellSouth's various violations, the Authority has a broad range within which to set an appropriate monetary sanction.

The Intervenor's do not have a specific recommendation for the level of any monetary sanctions. In general, we believe that any sanction, evidentiary or monetary, should be substantial enough to have its desired effect rather than being just a "cost of doing business." Compliance with the Authority's orders and cooperation in the orderly conduct of regulatory proceedings is a legal and ethical obligation, not a business decision. The Authority has previously expressed its concern that BellSouth was pursuing its corporate agenda at the expense of the Authority's ability to fulfill its statutory obligations. The Authority's actions in this matter, therefore, should be designed to convince BellSouth that: (1) compliance with the Authority's orders is mandatory; (2) noncompliance will not be tolerated; and (3) noncompliance will never be in BellSouth's best interests from either a regulatory or business standpoint.

² Interrogatory No. 36 requested two different flow through rates, for five different product categories, for nine different states, for each month since January 2001.

Respectfully submitted,

By: Jon Hastings
Jon Hastings
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2306
Attorney for MCI WorldCom, Inc.

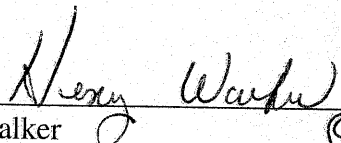
Henry Walker
Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363
Attorney for the Southeastern Competitive Carriers Association

Mike Hopkins
Mike Hopkins
AT&T of the South Central States
1200 Peachtree Street, NE
Suite 8100
Atlanta, GA 30309
Attorney for AT&T of the South Central States, L.L.C. and TCG MidSouth, Inc.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 13th day of February, 2002.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300


Henry Walker 